DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
701 S. COURTHOUSE ROAD, SUITE 1001
ARLINGTON, VA 22204-2490

[redacted]
Docket No. 8161-22
Ref: Signature Date

[redacted]

Dear [redacted]

This is in reference to your application for correction of your naval record pursuant to Section 1552 of Title 10, United States Code. After careful and conscientious consideration of relevant portions of your naval record and your application, the Board for Correction of Naval Records (Board) found the evidence submitted insufficient to establish the existence of probable material error or injustice. Consequently, your application has been denied.

Although you did not file your application in a timely manner, the statute of limitation was waived in accordance with the 25 August 2017 guidance from the Office of the Under Secretary of Defense for Personnel and Readiness (Kurta Memo). A three-member panel of the Board, sitting in executive session, considered your application on 13 January 2023. The names and votes of the panel members will be furnished upon request. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary material considered by the Board consisted of your application together with all material submitted in support thereof, relevant portions of your naval record, and applicable statutes, regulations, and policies, to include the Kurta Memo, the 3 September 2014 guidance from the Secretary of Defense regarding discharge upgrade requests by Veterans claiming post-traumatic stress disorder (PTSD) (Hagel Memo), and the 25 July 2018 guidance from the Under Secretary of Defense for Personnel and Readiness regarding equity, injustice, or clemency determinations (Wilkie Memo). Additionally, the Board also considered an advisory opinion (AO) furnished by qualified mental health provider and your response to the AO.

You enlisted in the Navy and entered active duty on 2 August 2001. Your pre-enlistment physical examination, on 28 June 2001, and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms. You did not disclose your extensive pre-service alcohol abuse history on your enlistment application.

On 8 January 2003, you received non-judicial punishment (NJP) for unauthorized absence (UA), being drunk on duty, failing to obey an order or regulation, and underage drinking. You did not appeal your NJP.

On 15 January 2003, a Navy Drug Screening Laboratory message indicated your urine sample tested positive for both cocaine and methamphetamine above the prescribed testing cutoff levels for both drugs. On 16 January 2003, your command notified you that you were being processed for an administrative discharge by reason of misconduct due to drug abuse. On 28 January 2003, you consulted with counsel and waived your right to present your case to an administrative separation board. In the interim, on 29 January 2003, a Navy Medical Officer determined that you were not drug dependent. Ultimately, on 7 February 2003, you were discharged from the Navy for misconduct with an under Other Than Honorable (OTH) conditions characterization of service and assigned an RE-4 reentry code.

On 10 January 2008, the Naval Discharge Review Board (NDRB) denied your initial application for discharge upgrade relief. The NDRB determined that your discharge was proper as issued and no change was warranted.

The Board carefully considered all potentially mitigating factors to determine whether the interests of justice warrant relief in your case in accordance with the Kurta, Hagel, and Wilkie Memos. These included, but were not limited to, your desire for a discharge upgrade and contentions that: (a) you had a serious mental illness manifest on active duty and get worse after service, (b) your mental illness began on active duty and the Department of Veterans Affairs (VA) already determined your illness was service-connected, (c) your active duty misconduct directly paralleled your mental illness, (d) your active duty psychiatric records and mental illness diagnoses began in December 2002, (e) your mental illness became severe enough that you were emergency admitted to a psychiatric treatment crisis facility for approximately two weeks, (f) your crime was committed while being affected by your service-connected disability, (g) post-discharge you have been continually treated for your mental illness, (h) your mental illness and conduct issues within society have persisted in a similar manner, and (i) the VA possesses extensive and voluminous documentation in support of your request, to include post-service psychiatric and treatment records. For purposes of clemency and equity consideration, the Board noted you did not provided a personal statement, VA documents, and other supporting documentation.

As part of the Board review process, the BCNR Physician Advisor who is a licensed clinical psychologist (Ph.D.), reviewed your contentions and the available records and issued an AO dated 21 December 2022. The Ph.D. stated in pertinent part:

> The Petitioner submitted administrative decision by Department of Veterans Affairs indicating that his character discharge is bar to VA benefits. He also submitted an affidavit of personal statement, order granting habeas corpus relief and vacating sentence from the state of [redacted] Circuit Court. The Order mentions post-service psychiatric records, but the Petitioner did not submit any of those psychiatric records. He submitted 3 medical records from his time in service

> as evidence for his petition: December 18, 2002, medical officer (psychiatrist) diagnosed the Petitioner with "Alcohol Dependence, with physiological dependence; Major Depressive Disorder, recurrent, moderate-severe, w/o [without] psychotic features, dysthymic disorder (by history); r/o [rule out] Bipolar Disorder and r/o Alcohol Induced Mood Disorder." The same psychiatrist saw the petitioner on January 8, 2003 and wrote, "He states that, 'I cannot go to that tiny room over there. I will do something that will result in me getting hurt. I'm on my way out. I won't do it directly, but I'll make sure that it happens somehow…' He admits to using alcohol daily during his AWOL time the last use was last evening. He also admits to using cocaine approximately an '8 ball' last use yesterday." He was subsequently diagnosed with" Major Depressive Disorder, recurrent severe, w/o psychotic features, alcohol dependence, cocaine abuse, THC abuse and Borderline Personality Disorder (provisional)." Following this note he was apparently admitted to an inpatient facility (High Pointe Hospital). His discharge note dated January 23, 2003 diagnosed him with the same diagnoses as above except for an addition of r/o Bipolar Disorder, personality disorder deferred, and "Moderate to Severe Stressors Secondary to Pending Legal Problems, as well as Girlfriend Who is Pregnant."
>
> The Petitioner was appropriately referred for psychological evaluation during his enlistment and properly evaluated over multiple encounters. His diagnoses were based on observed behaviors and performance during his period of service, the information he chose to disclose, and the psychological evaluations performed by mental health clinicians as documented in his service records. Post-service, it appears as though he has been diagnosed with Bipolar Disorder. Bipolar Disorder was diagnosed as a potential "rule-out" condition in service, because it would not have been possible to accurately diagnose Bipolar Disorder unless the Petitioner had been observed over several days, and multiple encounters as well as during an extended period of sobriety. Additional records (e.g., post-service mental health records describing the Petitioner's diagnosis, symptoms, and their specific link to his misconduct) would aid in rendering an alternate opinion.

The Ph.D. concluded, "it is my considered clinical opinion there is sufficient evidence of a mental health condition that existed during military service. There is insufficient evidence that his misconduct could be attributed to a mental health condition."

In response to the AO, you submitted additional documentation for consideration.

After thorough review, the Board concluded these potentially mitigating factors were insufficient to warrant relief. In accordance with the Hagel, Kurta, and Wilkie Memos, the Board gave liberal and special consideration to your record of service, and your contentions about any traumatic or stressful events you experienced and their possible adverse impact on your service. However, the Board concluded that there was no convincing evidence of any nexus between any mental health conditions and/or related symptoms and your misconduct, and determined that there was insufficient evidence to support the argument that any such mental health conditions

mitigated the misconduct that formed the basis of your discharge. As a result, the Board concluded that your misconduct was not due to mental health-related conditions or symptoms. Moreover, even if the Board assumed that your misconduct was somehow attributable to any mental health conditions, the Board unequivocally concluded that the severity of your misconduct outweighed any and all mitigation offered by such mental health conditions. The Board determined the record reflected that your misconduct was intentional and willful and demonstrated you were unfit for further service. The Board also determined that the evidence of record did not demonstrate that you were not mentally responsible for your conduct or that you should not be held accountable for your actions.

The Board observed that character of military service is based, in part, on conduct and overall trait averages which are computed from marks assigned during periodic evaluations. Your overall active duty trait average calculated from your available performance evaluations during your enlistment was approximately 1.0 in conduct. Navy regulations in place at the time of your discharge required a minimum trait average of 2.5 in conduct (proper military behavior), for a fully honorable characterization of service. The Board concluded that your conduct marks during your active duty career were a direct result of your serious misconduct which further justified your OTH characterization of discharge.

The Board noted that a fraudulent enlistment occurs when there has been deliberate material misrepresentation, including the omission or concealment of facts which, if known at the time, would have reasonably been expected to preclude, postpone, or otherwise affect a Sailor's enlistment eligibility. You technically fraudulently enlisted when you clearly intentionally failed to disclose your pre-service alcohol abuse history beginning at ages 12-13. The Board determined that you had a legal, moral, and ethical obligation to remain truthful on your enlistment paperwork. Had you properly and fully disclosed your extensive pre-service alcohol abuse history, you would have likely been disqualified from enlisting.

The Board noted that there is no provision of federal law or in Navy/Marine Corps regulations that allows for a discharge to be automatically upgraded after a specified number of months or years. The Board did not believe that your record was otherwise so meritorious as to deserve a discharge upgrade. The Board concluded that significant negative aspects of your conduct and/or performance greatly outweighed any positive aspects of your military record. The Board determined that illegal drug use by a Sailor is contrary to Navy core values and policy, renders such Sailors unfit for duty, and poses an unnecessary risk to the safety of their fellow Sailors. The Board determined that characterization under OTH conditions is appropriate when the basis for separation is the commission of an act or acts constituting a significant departure from the conduct expected of a Sailor. Moreover, absent a material error or injustice, the Board declined to summarily upgrade a discharge solely for the purpose of facilitating veterans' benefits, or enhancing educational or employment opportunities. As a result, the Board determined that there was no impropriety or inequity in your discharge, and even under the liberal consideration standard, the Board concluded that your misconduct and disregard for good order in discipline clearly merited your receipt of an OTH. The Board carefully considered any matters submitted regarding your character, including your post-service conduct; however, even in light of the Wilkie Memo and reviewing the record holistically, the Board did not find evidence of an error

or injustice that warrants granting you the relief you requested or granting relief as a matter of clemency or equity. Ultimately, the Board concluded the mitigation evidence you provided was insufficient to outweigh the seriousness of your misconduct. Accordingly, given the totality of the circumstances, the Board determined that your request does not merit relief.

You are entitled to have the Board reconsider its decision upon submission of new matters, which will require you to complete and submit a new DD Form 149. New matters are those not previously presented to or considered by the Board. In this regard, it is important to keep in mind that a presumption of regularity attaches to all official records. Consequently, when applying for a correction of an official naval record, the burden is on the applicant to demonstrate the existence of probable material error or injustice.

Sincerely,

1/24/2023

[redacted]

Executive Director
Signed by: [redacted]